

OPTIONS FOR INVESTMENT FOR ECONOMIC DEVELOPMENT

Section 303 of the American Indian Trust Fund Management Reform Act of 1994 requires, in part, that the Strategic Plan include the following:

(B) Provisions for opportunities for Indian Tribes to assist in the management of their trust accounts and to identify for the Secretary options for the investment of their trust accounts, in a manner consistent with the trust responsibilities of the Secretary, in ways that will help promote economic development in their communities.

The Strategic Plan identifies several options which would promote economic development in the American Indian communities:

New Trust Management Products Under Phase One of the Strategic Plan

At present the Federal fiduciary must manage investments in accordance with the limited investment opportunities accorded by the statutes, none of which permit economic development options of any kind. The Strategic Plan proposes that the Federal fiduciary's investment discretion be broadened so that the goals of the legislation can be achieved. Several options for making investment decisions are proposed, all of which would permit investments of Tribal trust funds in ways which would promote economic development in the American Indian communities and would include provisions for opportunities for Indian Tribes to assist in the management of their trust accounts.

The Strategic Plan proposes that the trustee will be governed by the prudent investor standard as adapted for the special circumstances of the trust relationship between the United States and Indian Tribes and individuals. The powers and responsibilities of the trustee will be more clearly defined by adopting a modified prudent investor rule. Generally, under the standard the trustee shall exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument. The governing instrument would be the applicable treaties, statutes, regulations, judgments, etc.

The prudent investor standard will allow the investment of trust funds in a wider variety of securities than are authorized under existing law and regulation in order to make these funds more productive for current and future beneficiaries. It will not impact the accepted traditional use of the land except to ensure that it is preserved for future generations. However, the standard will allow the investment of trust funds in higher yielding securities appropriate for the investment of funds held in trust including investment in Tribal infrastructure and development activities subject to prudential rules. Venture capital investments can also be made when appropriate to the objectives of the trust.

In addition to withdrawal of trust funds under 25 CFR 1200, the Tribes will have the right to participate with the trustee in developing an investment plan for their accounts. One of the responsibilities of the trustee will be to work with the beneficiaries to ascertain their needs and determine how reasonably to accommodate them, if possible.

Tribes could also elect to:

1. continue the trust funds management of their account under currently existing restrictions.
2. withdraw eligible trust funds from the Federal fiduciary as at present.

The terms of the instrument may set forth various types of unusual or restrictive investment provisions, such as:

- Prohibit the purchase or sale of a particular security or one in a particular industry.
- Require the fiduciary to purchase only certain authorized securities or limit investments in one asset or asset category to a specified amount to avoid a concentration.

Under each of the options, the Federal fiduciary could also make available to the beneficiary the benefit of its research services and act in an advisory capacity. The Federal fiduciary could also:

- Collect the principal of matured or called bonds.
- Collect and distribute income.
- Accept possession of securities for safekeeping.
- Notify customers of calls, subscription rights, defaults, etc.
- Provide periodic account statements.

Exercise of any one of the options would open up, on a par with the private sector, a whole range of investment opportunities to aid economic development, including:

1. Commercial, consumer, real estate and infrastructure investments and loans.
2. Fractionated Realty purchases, sales, loans to facilitate, dealing and management.
3. Development investments in infrastructure acquisition and development, project financing, venture capital to new businesses and capital for existing businesses.

Several new trust management products are proposed for implementation during Phase I of the Strategic Plan which would benefit both Tribal and IIM account holders and through prudential savings and investments promote economic development:

1. Demand and Savings Deposits exercised through a mutual fund type accounting system with checking account and payments services, including ATM access, cash management, accounting, statements and reporting, disbursements, wire transfer, official checks, money orders and access to discount brokerage.
2. Acceptance of voluntary deposits from all sources, including gaming revenue, with subsequent income free from Federal taxation.
3. Income from all trust accounts would be free of Federal taxation to encourage savings and economic development.
4. Acceptance of Retirement Accounts such as Keogh Accounts and IRAs.

Phase II Options for Economic Development

During Phase II of the Strategic Plan full service lifeline banking, trust and financial services exclusively for individual American Indians and Tribes will provide funding for economic development making such individuals and Tribes economically more independent over the next several decades. This will be facilitated by the creation of the American Indian Trust Development Bank (TDBank). It will include:

1. A full service trust system.

This requirement will be met by building a system to provide, directly and indirectly, full trust services to include managed, agency and custodial accounts, cash management accounts, comprehensive accounting and tax statements, discount brokerage, stock transfer, custody, pensions, collective investment funds, fixed income and equity research and advice, mutual funds and insurance sales and other trust services.

2. A full service banking and depository system and delivery system.

This requirement will be met by building a system to deliver, directly and indirectly, through multiple offices, full banking and depository services, to include demand and savings accounts, certificates of deposit, overdraft protection, money orders and official checks, escrow services, foreign exchange, capital market sales, discount brokerage, cash management services and other financial services.

3. A full service asset management, lending and leasing system and delivery system.

This requirement will be met by building a full service asset management, lending and leasing system to deliver, directly and indirectly, through multiple offices, commercial loans and leases, including corporate, small business, middle market and agriculture loans and leases; consumer loans and leases, including credit card, home equity, auto, mobile home, and personal loans and leases; real estate loans and leases including loans secured by single and multiple family housing and commercial real estate; and infrastructure and development loans and leases. Such systems will have origination as well as packaging, sales to the secondary market, servicing, loan participation and correspondent banking services capabilities.

4. A fractionated realty holdings purchase and sales program.

This requirement will be met by a full service asset management capability and program to purchase, sell, deal in, finance and service fractionated realty holdings. TDBank will be allowed to invest up to \$300 million in purchases and loans for this purpose, subject to prudential terms at market rates. This program will ensure the consolidation of existing fractional interests and the prevention or substantial reduction of further fractionation.

5. An investment capability for community development projects.

This requirement will be met by developing an investment capability to provide equity capital, perpetual preferred stock and long term subordinated debt for economic development of the trust lands and the Tribes and individual Indians and their business ventures. Such total investment not to exceed 1% of the Bank's equity capital to any single enterprise or project and 25% of equity capital (initially \$125 million) for the aggregate of all such investments. Such investments will include:

- Infrastructure acquisitions and development activities.
- Project financing.
- Venture Capital Businesses.
- Established Businesses.

6. A new management and institutional structure to accommodate restructuring & reorganization, to

include a new independent bank & trust structure with the following capital requirements:

Equity Capital	\$500 million
Borrowing Capacity	10 times capital
Initial Borrowing from U.S.	\$3 billion, 30 years, 30 year T rate

This new structure which will permit a singular focus on trust management responsibilities to American Indians and Tribes and more independence from the appropriations process; more self-determination; more economic independence; greater funding access to the capital markets; greater access to economic development and a management structure and salary and benefit scale similar to the Federal Reserve System, the Federal Home Loan Bank System, the Farm Credit System and the Federal financial regulators.

7. A headquarters building adjacent to national archives and records center.

The restructuring and reorganization will require a new headquarters building adjacent to the national archives and record center to accommodate the expanded products and services and the centralization of many of the systems.

The U.S. banking system has long been the engine for economic growth in the private sector. Government sponsored banks such as those in the Federal Home Loan Bank System (since the 1930s) and the Farm Credit System (since 1916) have been the engine of economic growth for American housing and American agriculture. The American Indian Trust Development Bank could be the engine of economic growth for American Indian trust beneficiaries in the next century.

DEPARTMENT OF THE INTERIOR POSITION ON BROADENING THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITIES

The Strategic Plan broadens the Federal Government's trust responsibilities in several ways which are consistent, in the view of the Special Trustee, with the Reform Act of 1994 requirements which, in part, requires the Strategic Plan to include:

(B) Provisions for opportunities for Indian Tribes to assist in the management of their trust accounts and to identify for the Secretary options for the investment of their trust accounts, in a manner consistent with the trust responsibilities of the Secretary, in ways that will help promote economic development in their communities.

The Strategic Plan proposes that Federal fiduciary discretion be broadened and new trust products offered to meet the goals of the legislation, all of which would provide "opportunities for Indian Tribes to assist in the management of their trust accounts" and "promote economic development in their communities" and which include as noted above:

1. Increasing investment discretion for the trustee and the Tribes through use of the prudent investor rule.
2. Allowing demand and savings deposits.
3. Accepting voluntary Tribal and IIM deposits from all sources, including gaming revenues.
4. Providing for income to be free of Federal taxation.
5. Accepting retirement accounts.

6. Providing full service trust and banking services in Phase II through the proposed Trust Development Bank.
7. Other as is indicated above in this section of the Strategic Plan.

The Department of the Interior has indicated that the Administration will evaluate the Special Trustee's final recommendations, considering the results of Tribal and individual account holder consultation, and submit its full views to the Congress as soon as practicable. The Department of the Interior has expressed some initial views on some of the Special Trustee's recommendations:

- The Department is opposed to expanding our investment responsibilities, and therefore would be opposed to (1) accepting voluntary deposits; and (2) increasing investment discretion. The Department does not support acceptance of voluntary deposits in IIM accounts. Most IIM accounts are "flow through" accounts; funds are regularly disbursed to the account holders. In theory, funds are only maintained as deposits in a limited number of cases: minors, non-compos mentis, and pending identification of beneficiaries. However, this policy has not always been adhered to, as there is regulatory authority to accept voluntary deposits in case of hardship to the account holder. The OTFM has a significant IIM data clean-up effort underway, in part, to ensure the number of IIM accounts is kept to a minimum. OTFM is also developing formal policy and procedures on establishing IIM accounts which they expect to disseminate in 199
- The Department also does not support increasing our investment discretion. Currently, investments are limited to direct investments in U.S. Government securities (Treasury and other agency issues) and insured deposits or deposits collateralized by U.S. Government securities. Tribes desiring more risky investments can withdraw their funds from trust under the authority of Title II of the American Indian Trust Fund Management Reform Act of 1994. Final regulations on withdrawing funds from trust were published on December 26, 1996.
- The Department does not support the establishment of a new government entity to manage the Federal Government's trust responsibilities.
- Viewed in isolation, the proposals related to expanding the government's responsibilities are generally inconsistent with government downsizing and deficit reduction. However, the systems portion of the Special Trustee's plan in general would tend to be consistent with government downsizing and deficit reduction.
- Notwithstanding and with due respect to the Department's position which is a very narrow reading of the scope of current statutory authority (See 25 U.S.C. 2), the Special Trustee believes that the new trust products are essential to the economic growth and prosperity of the American Indians. As to the investment discretion of the trustee, the Special Trustee believes authorizing the trustee to invest Indian trust funds in securities in addition to "public debt securities" more effectively supports the trustee's fiduciary duty to serve the best interests of the beneficiaries, allow the Tribes to participate in the management of their funds held in trust in a practical and purposeful way and need not expose the trust funds to unacceptable investment risk. It is a settled principle of trusts that the trustee is under a duty to the beneficiaries to use reasonable care and skill to make the trust property productive. In making investments, however, a loss is always possible, since in any investment there is always some risk of loss even with "public debt securities."
- Under accepted and established principles of trust law, it is not the duty of the trustee, either

individual or corporate in the private sector, to invest only in the very safest and most conservative securities available. Such investments may not be in the best interests of the beneficiaries. Assuming, for example, United States Government bonds are the safest and most conservative securities available but that income yield thereon is lower than other securities, it is not necessarily the duty of the trustee to invest the whole trust property, or even any part of it in such bonds. The reason for this is that by the use of care, skill and caution, an investment can ordinarily be made which will yield a higher income and as to which there is no reason to anticipate a loss of principal.